

Minutes (draft)
Forensic Science Board Subcommittee
April 19, 2006 – 9:00 a.m.
Fredericksburg, Virginia

Subcommittee Members Present

Mr. Joseph Bono
Colonel Steven Flaherty
Mr. Randolph Sengel

Department Staff Members Present

Ms. Wanda Adkins
Ms. Katya Herndon
Mr. Steven Sigel

Mr. Sengel called the meeting to order at 9:00 a.m. There were no members of the public in attendance. Due to mechanical problems with the recording equipment the meeting was not recorded.

The Subcommittee discussed the “Suggested Protocols” that were handed out at the February 8, 2006 regular meeting of the Forensic Science Board. The following are the subcommittee changes:

Suggested Protocol for Case Submission for Forensic DNA Examination

1. Submission of **any** request for forensic DNA examination must be preceded by a consultation between the Department of Forensic Science (DFS) regional laboratory designated representative and the primary investigating officer in the case or the Commonwealth’s Attorney assigned to the case. The purpose of this conference is to discuss selection of items to be submitted and prioritization of items submitted for analysis. If the Request for Laboratory Examination (RFLE) does not certify the name of the DFS representative and the date of the consultation, the submission will be declined.

In lieu of protocol # 1, the subcommittee recommends:

1. Submission of requests for forensic DNA examination in all cases where seven or more items (in addition to known samples) are contemplated for submission must be preceded by a consultation between a Department of Forensic Science (DFS) DNA examiner and the primary investigating officer or the Commonwealth’s Attorney assigned to the case. An “item” is a single unit of evidence requiring DNA analysis (however, for purposes of this protocol, a PERK is considered a single item). The purpose of this conference is to discuss

selection of items to be submitted and prioritization of items submitted for analysis. Pre-submission consultations may be conducted by telephone. Pre-submission consultations are strongly encouraged in any major case involving multiple item submission or multiple crime scene cases.

2. Submission of any request for DNA examination **must** contain a written statement which provides details of the facts and circumstances of the case. This statement will be used by DFS to aid in the prioritization of the case. Requests which are submitted without supporting statements will be declined. Statements should be attached to the RFLE.

In connection with this protocol, the subcommittee recommends:

- ***the Department revise the current RFLE form to allow additional space for a statement of facts concerning the case***
- ***the RFLE be made available electronically with expandable fields to allow for additional case information to be included as needed.***

In lieu of protocol # 2, the subcommittee recommends:

2. The RFLE for DNA examination should include a brief statement of facts about the case, and briefly indicate, with respect to each item submitted, the reason the requested analysis is necessary in order to aid examiners in selecting samples for testing (for example, in a B&E case, it should be noted that a blood swab was collected from the point of entry).

3. Each case submitted for DNA analysis will be prioritized with a top priority of I, to a lesser priority of III, using the following criteria:

Priority I: A violent crime (homicide, malicious wounding, felony sexual assault, robbery, or kidnapping/abduction) which indicates that a suspect is in custody, has a pending court date, and **all** relevant control or known DNA samples have been collected and submitted with the evidence in the case. Cases of this nature in which the submitting agency fails to provide all relevant control or known DNA samples will be assigned to Priority II.

Priority I: A violent crime serial in nature or an unsolved homicide or felony sexual assault which indicates an unidentified perpetrator, but where biological evidence which investigation indicates is reasonably attributable to the suspect and may assist with the identification through the use of the DNA data bank.

Priority II: A non-serial violent crime with no identified suspect.

Priority III: Property crimes. Cases in which DNA analysis is requested to determine possession of a firearm are considered property crimes, unless the firearm

has been identified as having been used in a pending case which has been submitted at a higher priority.

Priority I cases will be worked, taking into account order of submission and pending court dates. Assignment of Priority II and Priority III cases for forensic DNA examination will be in the sole discretion of the supervisor of the forensic biology section of each regional laboratory, taking into account first the number of pending Priority I cases, then the order of submission, and pending court dates.

In lieu of protocol # 3, the subcommittee recommends:

3. Cases submitted for DNA analysis generally will be prioritized as either priority I (crimes against persons) or priority II (property crimes/other).

Cases will be assigned for analysis by the supervisor of the forensic biology section of the laboratory taking into account public safety, pending court dates, order of submission, and number of pending cases. Information pertinent to assigning case priority should be included on the RFLE (for example, trial date, information that suspect is incarcerated or a juvenile). For efficiency, examiners may run less complex priority II cases with fewer items in conjunction with multi-item priority I cases.

4. In addition to submitted suspect and victim control (known) samples, all initial requests for examination will be **limited to five (5) items of evidence or less (knowns plus five items)**. Requests that exceed this limit will be declined. An “item” of evidence is a single item which requires analysis of a profile or mixture. (Example: five cigarette butts from the same ashtray would constitute five items.)

The subcommittee recommends protocol # 4 be eliminated.

5. When the initial request is completed by the DFS, and further investigation or analysis is deemed necessary and appropriate by agreement of the forensic biologist assigned, the primary officer, and/or the Commonwealth’s Attorney, additional requests for analysis may be made after consultation with DFS by the primary investigating officer or the Commonwealth’s Attorney assigned to the case.

The subcommittee recommends protocol # 5 be eliminated.

6. When a case becomes inactive, either through refusal to charge, dismissal or plea agreement, it is the responsibility of the primary officer and/or the assigned Commonwealth’s Attorney to notify DFS of that status. Analysis will cease, DFS will terminate the case, and submissions will be returned to the submitting agency.

The subcommittee recommends protocol # 6 be adopted as written.

7. Cases in which submissions are received in which analysis has not been initiated by DFS within 120 days of submission will be placed in inactive status and terminated, unless the RFLE is renewed within 10 days by the submitting agency. It is the responsibility of the submitting agency to maintain a roster of cases submitted, and to update DFS of the status of the case after 120 days.

In lieu of protocol # 7 the subcommittee recommends:

7. Prior to commencing an examination for DNA analysis, the examiner may call or e-mail the investigating officer to confirm that the case is still active and that the analysis is still necessary. Analysis will proceed upon confirmation of active case status. If no response is received from the submitting agency confirming active case status, the Department has the discretion to place the case in inactive status. A letter will be mailed to the investigating officer when a case is placed in inactive status.

Suggested Protocol for Submission of Drug Cases

1. Submission of any request for drug analysis **must** contain a written statement which provides details of the facts and circumstances of the case. This statement will be used by the Department of Forensic Science (DFS) to aid in the prioritization of the case. Requests submitted without supporting statements will be declined. Statements should be attached to the RFLE. When items are attributable to different suspects, the RFLE should identify the suspect(s) associated with each item.

In lieu of protocol # 1, the subcommittee recommends:

1. The RFLE for drug analysis should include a brief statement of facts about the case, and briefly indicate, with respect to each item submitted, the reason the requested analysis is necessary in order to aid examiners in selecting samples for testing (for example, in multiple suspect cases, RFLE should specify when different items are associated with different suspects so all items necessary for prosecution are tested).

2. Each case submitted for drug analysis will be prioritized with a top priority of I, to a lesser priority of V, using the following criteria:

Priority I: manufacture, distribute, possession with intent to distribute schedule I or II drugs; special circumstance cases (limited to cases in which the Commonwealth's Attorney requests drug analysis on an item of evidence deemed critical to the prosecution of a pending homicide or sexual assault case only.)

Priority II: manufacture, distribute, possess with intent to distribute more than ½ ounce of marijuana; manufacture, distribute, possess with intent to distribute schedule III drugs.

Priority III: possession of schedule I or II drugs (weighable quantity and/or countable dosage units required); manufacture, distribute, possess with intent to distribute schedule IV drugs.

Priority IV: manufacture, distribute, possess with intent to distribute ½ ounce or less of marijuana, residue only cases.

Priority V: possession of marijuana, possession of schedule III or IV, V, and VI drugs.

Analysis of cases will be conducted by DFS in order of submission according to case priority. Assignment of cases of lower priority for drug analysis will be in the sole discretion of the supervisor of the controlled substances section of each regional laboratory, taking into account the number of pending cases of higher priority.

The subcommittee recommended deferral of any attempt to prioritize drug analysis based on the type of drugs involved for the following reasons:

- ***prioritization of such a large number of cases according to such criteria would be a time consuming process for Department personnel such prioritization could unfairly impact law enforcement efforts which may vary in focus from region to region the impact of revisions to the Code of Virginia which take effect on July 1, 2006 may significantly reduce the need for analysis in possession of marijuana cases. This reduction could in turn allow for more efficient methods of drug case analysis to be implemented after the impact of these statutory changes are fully known.***

Alternatively, the subcommittee recommends that the Department continue to utilize its present system of prioritization of drug cases, which focuses on pending trial dates. To that end, the subcommittee recommends that the RFLE be amended so as to provide the submitting agency the space to indicate the preliminary hearing date and the trial date. Further, the subcommittee recommends that law enforcement agencies and Commonwealth's Attorney's Offices be encouraged to communicate on a regular basis pending trial dates for felony drug cases pending in their jurisdiction.

3. Cases in which submissions are received in which analysis has not been initiated by DFS within 120 days of submission will be placed in inactive status and terminated, unless the RFLE is renewed within 10 days by the submitting agency. It is the responsibility of the submitting agency to maintain a roster of cases submitted and to update DFS regarding the status of the case after 120 days.

In lieu of protocol # 3, the subcommittee recommends:

3. Prior to commencing drug analysis, the examiner may call or e-mail the investigating officer to confirm that the case is still active and that the analysis is still necessary. Analysis will proceed upon confirmation of active case status. If no response is received from the submitting agency confirming active case status, the Department has the discretion to place the case in inactive status. A letter will be mailed to the investigating officer when a case is placed in inactive status.

4. When residue items are submitted with weighable quantities and/or countable dosage units of drugs, only the weighable (countable) item(s) will be analyzed, unless a written, case-specific request for analysis of the residue is received from the Commonwealth's Attorney which articulates a particular reason for analysis of the residue. (For example, analysis of an item such as a pipe containing residue found in possession of a defendant is necessary to show possession of a weighable quantity of drugs found nearby.)

The subcommittee recommends that protocol # 4 be amended to allow the investigating or submitting officer to articulate the request for residue analysis on the RFLE.

5. Analysis and identification of prescription drugs in tablet or capsule form in schedules III, IV, V, and VI will be by physical identification only. DFS will not perform chemical analysis on tablets or capsules in these schedules, other than tests currently mandated by DFS protocol regarding tampering and screening.

The subcommittee recommends that protocol # 5 be eliminated and that testing of samples in multiple item submissions be carried out in accord with the DFS drug sampling protocol scheduled to be implemented on or about May 1, 2006. A copy of this protocol is attached.

6. Submissions containing controlled substances of different schedules will be accepted for analysis of the drug of the highest schedule only, and priority will be assigned according to the highest schedule. A written, case-specific request from the Commonwealth's Attorney which articulates a particular reason for analysis of lower schedule items is required for analysis of the lower schedule items received.

The subcommittee recommends that protocol # 6 be amended to allow the investigating or submitting officer to articulate the request for examination of a lower schedule drug on the RFLE.

7. Cases designated for federal prosecution will not be accepted for analysis by DFS. Agencies are directed to determine whether federal prosecution is indicated before submitting evidence, and cases in which federal prosecution is intended should be submitted to the DEA laboratory for analysis. Analysis of cases for federal prosecution requires additional laboratory testing not normally required for cases submitted for state prosecution, and DFS will no longer conduct these additional tests to support federal prosecution.

The subcommittee recommends that , in lieu of protocol # 7, the issue of federal vs. state prosecution be addressed by adoption of the protocol proposed by the Department of Forensic Science, which states as follows:

RE: New Submission Guidelines for Drug Task Force Cases

The Department of Forensic Science (DFS) continues to experience a significant backlog of controlled substances cases. The analytical testing required to support federal prosecutions, which often includes time consuming quantitations and base determinations, exceeds the testing performed to support most state prosecutions. Additionally, testimony in federal cases is frequently required. DFS is tasked by statute (§ 9.1-1109) with providing forensic laboratory services to Virginia law enforcement agencies. This statute allows DFS to provide such services to any federal investigatory agency within available resources. In light of our current caseload and the delayed turnaround time to our state user agencies, we do not have the resources available to routinely provide scientific testing to support federal drug prosecutions.

After consultation with the Drug Enforcement Administration (DEA), we have developed the following guidelines for handling drug task force cases:

- ***Evidence collected by drug task forces should not be submitted to the laboratory until federal and state prosecutors have decided who will prosecute the case***
 - o ***Cases slated for state prosecution will be accepted by DFS from state or local agencies***
 - o ***Cases slated for federal prosecution will be accepted by DEA from any federal investigative agency with a federal case number***
- ***Cases that are submitted to DFS that will be adjudicated in federal court will be placed at a lower priority than any Virginia cases and scheduled federal court dates will not elevate this priority***
- ***DFS protocols will be utilized for normal case examinations and may not provide results that can support federal charges or penalties***
 - o ***Written requests from federal prosecutors will be required for additional analysis on previously completed cases. Such requests will be considered by DFS management.***

8. Any case submission with multiple items is limited to a maximum of five items per case. When analysis of items initially submitted has been completed, and further investigation or analysis is deemed necessary and appropriate by agreement of the forensic scientist, the primary officer and/or the Commonwealth's Attorney, additional requests for analysis may be made after consultation between DFS, the primary officer, and/or the Commonwealth's Attorney. This numerical limitation does not apply to cases of manufacturing, distribution, or possession with intent to distribute controlled substances in which five or more individually contained quantities (packages, vials, bags, or countable dosage units) of controlled substances are seized.

The subcommittee recommends protocol # 8 be eliminated.

9. When a case becomes inactive, either through refusal to charge, dismissal or plea agreement, it is the responsibility of the primary officer and/or the assigned Commonwealth's Attorney to notify DFS of that status. Analysis will cease, DFS will terminate the case, and submissions will be returned to the submitting agency.

The subcommittee recommends protocol # 9 be adopted as written.

10. Cases involving found property in which no suspect is identified will not be accepted for drug analysis and should not be submitted.

The subcommittee recommends protocol # 10 be adopted as written.

The meeting concluded at 11:10 a.m.